United States Court of Appeals

for the Second Circuit

REPLY BRIEF

76-4068

IN THE

UNITED STATES

COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 76-4068

MOHAWK EXCAVATING, INC.

Petitioner,

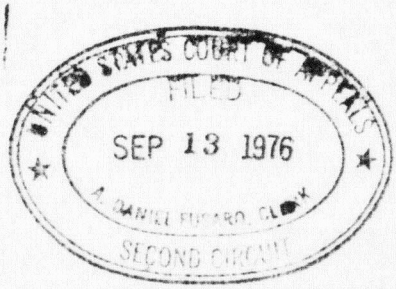
versus

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION, UNITED STATES DEPARTMENT OF LABOR, ET AL.

Respondent.

ON PETITION FOR REVIEW OF AN ORDER OF THE OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

REPLY BRIEF OF PETITIONER



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UNITED STATES CONSTITUTION

MISCELLANEOUS

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PETITIONER'S STATEMENT OF THE CASE IN REPLY

The Petitioner will briefly comment upon certain points asserted by the Secretary in the counterstatement.

Much is made in his brief (Page 3) of the fact that Mohawk's foreman immediately followed the direction by the OSHA area director to get a ladder. When told almost ex cathedra that it was "the opinion of the government that "it" (using the I-beams or ribs) "constituted a hazard" (Tr. 12) of course, he complied. The foreman probably would have put Paddy's pig in the trench if the OSHA Area Director had requested such. Mr. Smith was giving orders (2 Tr. 89) and threatening fines (2 Tr. 88).

Also, the Secretary would have the Court conclude that getting out of the trench required olympic talents. The Area Director himself did not go into the trench (or try to get out of it). He would not permit anyone to demonstrate the ease or speed by which the trench box could be scaled (2 Tr. 88). There was considerable variation in the estimates as to distance between the trench bottom and the first I-beam, or rib (See 2 Tr. 150). Smith himself took no measurements. In any case, everyone who has ever scaled the trench box, or seen it scaled, testified without hesitation on both direct and cross that the I-beams may be used easily and quickly (2 Tr. 110, 2 Tr. 111, 2 Tr. 64, 2 Tr. 174, 2 Tr. 215, etc.). There is no evidence in the record that Mr. Smith bothered to have anyone try it or that the trial judge tried it

(or even that the petitioner's portly attorney has successfully and easily done it). Moreover, Smith's main concern, a preposterous one and now vacated by the trial judge (JD 9) was that the pressure of the men's bodies when exiting could bring the box down. (Tr. 126).

I. Argument in Reply

A. THE FINDING OF THE ADMINISTRATIVE LAW JUDGE IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE. ANY AMBIGUITY SHOULD BE RESOLVED IN FAVOR OF MOHAWK. MOHAWK DID PROVIDE ADEQUATE MEANS OF EXIT.

The Administrative Law Judge below concluded that Mohawk had violated CFR§ 1926, 652 (h), the essence of which is that an employer must provide "an adequate means of exit" in a working situation involving a trench deeper than four feet. The regulation indicates "such as ladder or steps", but their very use of the expression "such as", means that the means of exit noted are illustrative and by no means meant to be exclusive.

There is nothing anywhere to indicate that Mohawk's alleged violation was willful or knowing. The accepted practice in the trade was to consider such means of exit as preferable. The experienced men in the trench preferred the ribs (2 Tr. 215), as did Mohawk's working president, Mr. Johnson (2 Tr. 110). The two independent engineers both concurred that the ribs were an adequate means of exit (2 Tr. 64, 2 Tr. 174). The OSHA inspector's knowledge in the field was minimal (2 Tr. 175), a fact admitted implicitly by the Secretary in his brief (Page 10, Note 6) when he argues that the judge did not rely on the opinion of the Secretary's Area Director.

There is no evidence in the record that Mohawk had been apprised that the "ribs" means of exit was not adequate. No trade literature was produced to this effect. No expert opinion was offered to the contrary. As noted above, the Secretary vastly multiplies and magnifies the difficulty in exiting a trench via the ribs.

Given no adequate literature or expert opinion in the field to the contrary, the ribs must be considered adequate or at least any ambiguity or lack of clarity should be resolved in favor of the good faith employer. Diamond Roofing v. OSHRC 528 F.2d 645 (C.A. 1976). See also Underhill Constr. Corp. v. Secretary of Labor, 526 F.2d 53 (C.A. 2, 1975), where at Page 57 in Note 10, this concept is preliminarily recognized by Judge Meskill.

As stated by Judge Brown in Diamond (at Page 649):

> Like other statutes and regulations which allow monetary penalties against those who violate them, an occupational safety and health standard must give an employer fair warning of the conduct it prohibits or requires, (emphasis added) and must provide a reasonably clear standard of culpability to circumscribe the discretion of the enforcing authority and its agents.

Mohawk's case is very much here. The inspector saw fit to make up his own rules as he went along (Tr. 144) and when challenged he declined to listen, saying only (2 Tr. 214), "fight me in court".

Because of the massive burden imposed on the employer to contest a citation, the case sub judice being an excellent example, and the minimal role permitted to courts, at the very least any regulation cited should be clear and not vague or ambiguous.

Ambiguity in a government publication is the fault of the government and any doubt should be resolved in favor of the citizen: "The Secretary as enforcer of the Act has the responsibility to state with ascertainable certainty what is meant by the standard he has promulgated...The Act grants the Secretary...not OSHRC or the courts (emphasis supplied) the means to amend the regulation if he so desires" Diamond Roofing (at Page 649).

In the Mohawk case, the Administrative Law Judge saw fit, apparently, to amend the regulation by declaring "the obvious solution to this situation is to weld or permanently affix a metal ladder" (JD 10); undoubtedly a good suggestion to be made to the Secretary for the next regulation revision, but hardly fair to Mohawk at this stage. Any such conclusion should be struck down.

On questions of fact the statute provides (29 U.S.C. §660 (a)) that "The findings of the Commission with respect to questions of fact, if supported by substantial evidence on the records considered as a whole shall be conclusive". Accord: Beall Construction Co. v. OSHRC 507 F.2d 1041 (C.A. 8, 1974).

What then is "substantial evidence"? The OSHA cases in the Courts of Appeals do not define the expression. The Mine Safety Act has an almost identical provision: 30 U.S.C. § 816 (b). In interpreting this section it was held by the Fourth Circuit "This is the same as that prescribed under the Administrative Procedure Act, 5.U.S.C.A. § 1009 (e)" (now 5.U.S.C. 706 (2) (E) Rosedale Coal Co. v. Director of Mines Bureau 247 F.2d. 299, 301.

In Universal Camera Corp. v. Labor Board 340 U.S. 474, 477; 71 S.Ct. 456, the standard is set forth. Substantial evidence is such relevant evidence that a reasonable mind might accept to support a conclusion. Judges are not expected to be "automata" (at 340 U.S. 489 175, S.Ct. 465) the Court concluded that the reviewing courts "should assume more responsibility for the reasonable and fairness" of the administrative agencies. Reviewing courts "are not to abdicate their convential judicial function" 340 U.S. 490.

> "The Board's findings are entitled to respect, but they must nonetheless be set aside when the record before a Court of Appeals clearly precludes the Board's decision by being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence." 340 U.S. 490, 71 S.Ct. 466.

It is the petitioner's position then that in finding the means of exit inadequate, the administrative law judge did not do so on substantial evidence on the record. Everyone at the trial who had significant experience with the means of exit provided testimony contrary to his findings. There was no testimony by anyone who had ever been in the trench and used the I-beams that such procedure was unsafe, hazardous or indeed posed any problems.

B. OSHA VIOLATES THE UNITED STATES CONSTITUTION MOST NOTABLY THE 7TH AMENDMENT. THIS PROCEDURE IS BASICALLY ONE AT COMMON LAW, YET NO JURY TRIAL WAS AFFORDED.

The question of whether an action under OSHA is a suit at common law is highly interesting. Certiorari, to the Supreme Court

has been granted on that issue in Frank Irey, Inc. v. OSHRC. 519 F.2d 1200 (C.A. § 3, 1975), cert. granted, No. 75-748.

Clearly the legislators considered OSHA to be a mere restatement of existing common law duties between employer and employee. See H.R. Rep. No. 1291 91st. Cong., 2d. Sess. 21 (1970) and S. Rep. No. 1282, 91st Cong., 2d. Sess. 9 (1970). In the language of the Senate Report:

> Under principles of common law, individuals are obliged to refrain from actions which cause harm to others: Courts often refer to this as a general duty to others. Statutes increase, but sometimes modify this duty. The committee believes that the employers are equally bound by this general and common duty to bring no adverse effects to the life and health of their employees, throughout the course of their employment .... (The Act) merely restates that each employer shall furnish this degree of care.

A leading commentator substantially acknowledged the common law origins and underpining of OSHA, but concluded that OSHA increased the level of common law employer responsibility for employee safety. Morey, 86 Harv. L. Rev. 988

Other statutes have similar common law employer-employee origins, e.g. the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. §801 et seq.("Mine Safety Act"). This statute has provisions for stinging the employer through the pocketbook also. Civil penalties not exceeding $10,000.00 for each violation can be assessed 30 U.S.C. §819 (a) (i). It has many marked similarities to OSHA as a prototype. Significantly different is that it does not ride roughshod over courts, juries and the Seventh Amendment. Under the Mine Safety Act, if the offending company does not pay the penalty administratively assessed, the Secretary must petition for enforcement in the local federal district court. The federal

district court is actively and meaningfully involved in order to resolve the issues relevant to the amount of the penalty in a de novo proceeding with a jury trial if requested. Ind. Coal Operator's Ass'n. v. Kleppe - U.S. - , 96 S. Ct. 809, 812 (1976); 30 U.S.C. §819 (a) (4).

It is the very essence of petitioner's objection that there is no such provision in OSHA so that the door is wide open to financial assaults by bureaucrats, unrestrained by juries with their common sense and practicality and with only minimal court involvement.

Indeed, OSHA as drafted seeks to use the federal courts as mere rubber stamps or at least minimizes their role for the sake of bureaucratic efficiency. See Sec. 10 (b) and 11 (b) of the Act. In Brennan v. Winters Battery Manufacturing 531 F.2d 317 (C.A. 6, 1975), Judge Philips judicially tried to amend Section 11 (b) of OSHA (29 U.S.C. 660 (b))so as to correct an attempt to reduce the Court of Appeals to a clerical role. There is a dramatic difference in court participation between Section 17 (1) of OSHA (29 U.S.C. §666 (k) and Section 109 (a) (4) of the Mine Safety Act (30 U.S.C. 819 (a) (4)). It is the petitioner's position that this difference in OSHA violates the 7th Amendment.

The case of Curtis v. Loether 415 U.S. 189, 94 S.Ct. 1005 (1974) should afford this Court considerable guidance on the question of the viability of the common law and the application of the Seventh Amendment. The Curtis case, written by Justice

Marshall concerned Title VIII as it pertained to housing discrimination violations. The issue there was whether a jury trial could be avoided in a situation where monetary penalties were involved. The answer was no. The Supreme Court felt it clear that Seventh Amendment entitled either party to a jury trial in an action for damages in the federal courts.

Although there are many postural differences, Mohawk urges that Curtis offers insight and is a favorable precedent in the following ways:

(1) The living nature of the common law was recognized. "It has long been settled that the right extends beyond the common-law forms of action recognized (in 1791)" 415 U.S. 194; 94 S. Ct. 1007

> Whatever doubt may have existed should now be dispelled. The Seventh Amendment does apply to actions enforcing statutory rights and requires a jury trial upon demand, if the statute creates legal rights and remedies, enforceable in an action for damages in the ordinary courts of law.

(2) Mohawk has contended that OSHA is basically a restatement (and an upward increase to an extent) of the common law duties of employer to employee. Likewise, the Supreme Court concurred with the Court of Appeals that Title VIII was basically an extension of the common law duty of innkeepers. 415 U.S. 197, 94 S.Ct. 1009, at note 10. Thus a suit at common law was involved.

Justice Marshall also admitedly stated the Seventh Amendment is generally inapplicable in administrative proceedings "where jury trials would be incompatible with whole concept of adminis-

trative adjudication". He goes on to indicate that there must be a "functional justification" before the right to a jury trial may be disregarded. 415 U.S. 195, 94 S.Ct. 1008.

The Mine Safety Act functions with a jury trial provision. There is no evidence that its successor, OSHA, can not easily do the same. The thrust of Justice Marshall's opinion, in petitioner's interpretation, is that jury trials must be provided except upon clear showing of nonworkability with juries.

Much has been made by the Secretary that OSHA has its origins in equity. The legislative history, noted above, strongly refutes this. Moreover, to an extent the Supreme Court may have provided a meaningful distinction. In Pernell v. Southall Realty 416 U.S. 363, 370 (1974), Justice Marshall upheld again the right to a jury trial in action for possession at law. The Court quoted and thereby approved the distinction determined in Whitehead v. Shattuck 138 U.S. 146, 151 (1891).

It is "difficult, and perhaps impossible to state a general rule which would determine in all cases, what should be deemed a suit in equity...., but this may be said, where an action is...for the recovery of a money judgment, the action is one at law."

Where then is the line beyond which Congress cannot go in eliminating jury trials? Mere nomenclature by Congress should not be controlling. Since the days of John Marshall, it is the prerogative of courts to define this line and protect it.

The petitioner heartily agrees with the excellent dissents by Judge Gibbons in Irey, 519 F.?d 1200 (C.A., 1975). in both his panel and en banc decisions. This dissent holds in essence that the Seventh Amendment mandates a jury trial with respect to penalty proceedings under the Occupational Safety and Health Act. The petitioner will not rehash this analysis but it does commend such opinion to this Court and urges its adoption in the Second Circuit. The issues raised by Judge Gibbons were sufficiently mentioned so as to gain the approval of four of the circuit judges in Philadelphia. The Supreme Court is due to hear the issue shortly.

Most eloquent was Judge Gibbons when he stated in Irey, "In the absence of a case in point in the Supreme Court, I prefer to assume that the Seventh Amendment still has meaning" Irey at Page

And, our third president:

> "I consider trial by jury as the only anchor ever yet imagined by man by which a government can be held to the principles of its Constitution. Letter from Thomas Jefferson to Thomas Paine, dated July 10, 1789, 15 Thomas Jefferson Papers 269 (1950)

II. Conclusion

The federal courts have vigorously guarded the right to a jury trial, as provided for in the Seventh Amendment, for almost two centuries. The petitioner asks this Court to join a line of many predecessors who have worked to preserve this precious right.

An OSHA civil penalty, despite nomenclature or semantics is in reality, an action for a money judgment in personam against the petitioner. The petitioner therefore asks for a decision declaring that an OSHA penalty proceeding is, in effect, an action for money damages, and thus, the petitioner must be afforded the right to a trial by jury, or at least a subsequent de nova judicial review with a jury available as in the Mine Safety Act. Absent such a similar provision, the petitioner asks that this court declare OSHA unconstitutional.

In addition, OSHA civil penalties are penal in nature which should entitle citizens to the guarantees of the Fifth and Sixth Amendment.

The aim of Congress is no doubt laudable, but a line has been crossed which violates the United States Constitution. Let this Court recognize this and declare OSHA unconstitutional.

This brief is accordingly respectfully submitted to this Court.

Dated at New Britain, Connecticut, this 10th day of September, 1976.

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The undersigned certifies that two copies of the foregoing Reply Brief of Petitioner were served by appropriate air or surface mail, properly addressed and with sufficient postage thereon, upon:

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A copy of the foregoing Reply Brief of Petitioner has been posted in a conspicuous place where employees can see it at 240 Stamm Road, Newington, Connecticut, and all such employees have been advised of their right to participate in these proceedings.

This 10th day of September, 1976.

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